No. 14-18-00600-CR

In the Court of Appeals
For the Fourteenth District of Texas
At Houston

No. 2130699
In County Criminal Court at Law Number Ten
Of Harris County, Texas

Phi Van Do
Appellant

v.

State of Texas
Appellee

State's Motion for en banc Reconsideration

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Ground for Rehearing

The panel opinion conflicts with another panel opinion from this Court. In *Niles*, a different panel of this Court applied the egregious-harm standard to the unobjected-to omission of an element from the jury charge. Here, the panel applied the harmless-beyond-a-reasonable-doubt standard to exactly the same type of error.

In *Niles v. State*, ___ S.W.3d ___, No. 14-15-00499-CR, 2019 WL 3121781 (Tex. App.—Houston [14th Dist.] July 16, 2019, no pet. h), a panel of this Court held that the unobjected-to omission of an element from the jury charge will lead to appellate reversal only if it causes egregious harm.

This case also involved the unobjected-to omission for an element from the jury charge. In its opinion, though, the panel applied the harmless-beyond-a-reasonable-doubt standard and concluded reversal was appropriate. This is a clear conflict with *Niles*.

In its brief, the State, relying on a Colorado case cited in the Court of Criminal Appeal's earlier opinion in *Niles*, asserted the error here was constitutional error subject to the harmless-beyond-a-reasonable-doubt standard. The Court of Criminal Appeals had not addressed preserva-

tion in its opinion, despite it being very obvious the error was unobjected-to. *See generally Niles v. State*, 555 S.W.3d 562 (Tex. Crim. App. 2018).

After reviewing this Court's opinion in *Niles*, it is apparent the egregious harm standard was correct there and should apply to this case as well. Even constitutional errors can be forfeited by the failure to object. Without an objection to the constitutional error, all that is left is the egregious-harm standard provided by *Almanza* for unobjected-to jury charge error.

The appellant did not object to the trial court's failure to include the element in the jury charge. (*See* 3 RR 74-77 (charge conference)).[1] Defense counsel mentioned the matter, but not until the beginning of the punishment phase, thus the objection was untimely. (4 RR 5); *see* TEX. CODE CRIM. PROC. art. 36.14 (requiring objection to jury charge before charge is read to jury); *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1984)(op. on reh'g)(requiring "timely" objection for defendant to avoid "egregious harm" standard on appeal).

[1] The panel opinion has a paragraph describing the harm standard applicable to objected-to jury charge error. *Do v. State*, ___ S.W.3d ___, No. 14-18-00600-CR, 2020 WL 1619995, at *5 (Tex. App.—Houston [14th Dist.] Apr. 2, 2020, no pet. h.). Nowhere does the panel say the appellant objected to the jury charge error.

With this case and *Niles*, this Court hast two published opinions that apply different harm standards to exactly the same type of error. En banc reconsideration is appropriate to maintain uniformity in this Court's opinions. TEX. R. APP. P. 41.2(c).

The omission of the .15 element from the jury charge was not egregiously harmful.

Niles described the egregious harm standard:

> Egregious harm occurs when the error affects the very basis of the case, deprives the defendant of a valuable right, or vitally affects a defensive theory. Egregious harm is a difficult standard to prove, and such a determination must be done on a case-by-case basis. Errors that result in egregious harm are those that affect the very basis of the case, deprive the defendant of a valuable right, or vitally affect a defensive theory. The record must show that a defendant has suffered actual, rather than merely theoretical, harm from jury instruction error. In the egregious-harm analysis we consider (1) the charge itself; (2) the state of the evidence including contested issues and the weight of the probative evidence; (3) arguments of counsel; and (4) any other relevant information revealed by the trial record as a whole.

Niles, 2019 WL 3121781, at *2 (quotations and citations omitted).

Here, just like *Niles*, the charge omitted an element—namely, the allegation that an analysis of the appellant's blood showed an alcohol concentration of .15 or above. This weighs in favor of reversal.

Here, just like *Niles*, evidence proving the omitted element was submitted to the jury. Here, like *Niles*, the evidence of the omitted element was essentially uncontested. While a conviction for driving while intoxicated requires the State to prove actual intoxication when the defendant was actually operating a motor vehicle—which, in cases of breath or blood tests, can involve questions about retrograde extrapolation, how the test was conducted, and the reliability of the testing device—all that is required for the .15 element is to show "an analysis of a specimen of the [defendant's] blood, breath, or urine showed an alcohol concentration level of 0.15 or more at the time the analysis was performed." TEX. PENAL CODE § 49.04(d).

The jury found the defendant was intoxicated when he was driving. And the breath test showed an alcohol concentration of .194. (State's Ex. 5). There was no evidence or argument that the test result did not show a blood alcohol concentration of .15 or above. *Cf. Navarro v. State*, 469 S.W.3d 687, 697 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd)(where test of defendant's blood plasma showed alcohol concentration of .158, which State's witness explained meant defendant's blood alcohol concentration was .132, evidence was insufficient to prove

.15 element). Just like *Niles*, where the omitted element was another objective fact—is a firefighter a public servant?—this weighs against reversal.

In *Niles*, this Court assessed the arguments of the parties by looking at whether the defendant ever contested the omitted element. *Niles*, 2019 WL 3121781, at *2. Here, the primary defense was that the appellant was detained illegally. While the appellant argued his breath test results were incongruous with his appearance in videos, he never argued that if he was intoxicated the test results were less than .15. This weighs against reversal.

The omission of the .15 element was error, but that element is an objective fact proved by essentially uncontested evidence. After the jury returned a finding that the appellant was intoxicated, finding that .194 is greater than .15 was a foregone conclusion. At a bare minimum, the failure to submit the .15 element to the jury was not egregiously harmful.

Conclusion

The State asks this Court to reconsider the panel opinion, issue an opinion consistent with *Niles*, and affirm the trial court's judgment.

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